(12)

Supreme Court, U.S.
FILED
JAN 22 2004
OFFICE OF THE CLERK

No. 02-1632

IN THE

Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Writ of Certiorari to the Washington Court of Appeals, Division III

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

This case involves a system of guided discretion in sentencing, implemented through sentencing guidelines. The judge has discretion to depart upward or downward from the standard sentence based on any aggravating or mitigating factors not accounted for in the definition of the offense or calculation of the standard sentence. The case presents in following questions:

1. In such a system, does the rule of *Apprendi* v. *New Jersey* require that the facts used to justify an upward departure be treated as elements of an offense, *i.e.*, found by the jury and proven beyond a reasonable doubt?

2. Does the answer to Question 1 depend on whether the standard range is established by the legislature directly by statute or indirectly through a sentencing commission?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

Sentencing reform through structured discretion should not be penalized with additional constitutional restrictions 4

II

There is no basis for distinguishing the Washington system from the federal system for Sixth Amendment purposes 10

III

The relevant "range," for purposes of *Apprendi*, is the range set by statute for Class B felonies 12

Conclusion 15

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U. S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) 5, 10, 11, 12, 14

Dennis v. United States, 339 U. S. 162, 94 L. Ed. 734, 70 S. Ct. 519 (1950) 5

Edwards v. United States, 523 U. S. 511, 140 L. Ed. 2d 703, 118 S. Ct. 1475 (1998) 8

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) 6

Hewitt v. Helms, 459 U. S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983) 9

Koon v. United States, 518 U. S. 81, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996) 5, 6, 7

Loving v. United States, 517 U. S. 748, 135 L. Ed. 2d 36, 116 S. Ct. 1737 (1996) 11

Mistretta v. United States, 488 U. S. 361, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) 5, 6

Mitchell v. United States, 526 U. S. 314, 143 L. Ed. 2d 424, 119 S. Ct. 1307 (1999) 7

Payne v. Tennessee, 501 U. S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) 8

Ring v. Arizona, 536 U. S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002) 10, 11, 13

Sandin v. Conner, 515 U. S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995) 9

Sawyer v. Whitley, 505 U. S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) 6

Shafer v. South Carolina, 532 U. S. 36, 149 L. Ed. 2d 178, 121 S. Ct. 1263 (2001) 13

State v. Blakely, 111 Wash. App. 851, 47 P. 3d 149 (2002) 3

State v. Gore, 143 Wash. 2d 288, 21 P. 3d 262 (2001) 3

Tuilaepa v. California, 512 U. S. 967, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994) 13

United States v. Banks, 540 U. S. __ (No. 02-473, Dec. 2, 2003) 8

United States v. Watts, 519 U. S. 148, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) 7, 8

Williams v. New York, 337 U. S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949) 6

Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 6

United States Statutes

Pub. L. 108-21, 117 Stat. 650 8

State Statutes

Former Wash. Rev. Code § 9.94A.120(2) 13

Former Wash. Rev. Code § 9.94A.390 13

Wash. Rev. Code § 9.94A.535 14

Wash. Rev. Code § 9A.20.021 14

Treatise

1 W. LaFave, Substantive Criminal Law (2d ed. 2003) . . . 11

Miscellaneous

K. Halle, The Irrepressible Churchill (1985) 9

W. Rehnquist, Remarks to the Federal Judges Assn. Bd. of Directors (May 5, 2003) (http://www.supremecourtus.gov/publicinfo/ speeches/sp_05-05-03.html) 8

Reitz, Sentencing, in The Handbook of Crime and Punishment (M. Tonry ed. 1998) 6

IN THE

Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The defendant's claim in the present case is, in reality, an attack on all guided discretion sentencing systems. Although he claims to distinguish the federal system, acceptance of his thesis would inevitably apply the same rule to the federal

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

Sentencing Guidelines and similar systems in numerous States, just as *Apprendi* v. *New Jersey* inevitably brought down long-established capital sentencing systems.

Defendant's thesis would require treating as an "element" every fact used to depart upward from the standard sentencing range for an offense. It would likely require similar treatment for facts used to compute the standard sentence. Requiring aggravating facts to be proved beyond a reasonable doubt to a jury while mitigating facts have no such requirement would substantially skew sentencing in guided discretion systems. These systems have been constructed on the understanding that sentencing facts are determined on a symmetrical basis, just as they always were in the unfettered discretion systems. Skewing them downward in this manner would result in wholesale reductions of sentences below what the people, through the democratic process, have determined to be necessary for their protection from crime. This result would be contrary to the interests of victims of crime and the law-abiding public that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The trial court made extensive findings of fact in this case. J. A. 40-49. Briefly, defendant Ralph Howard Blakely and his wife Yolanda Blakely were involved in a bitter divorce and property dispute. Defendant went to Yolanda's home, in violation of a restraining order, and accosted her as she returned from her mailbox. He duct-taped her head and wrists and threatened her with death if she did not cooperate, apparently meaning that she dismiss the litigation over the family trust. He put her in a plywood box, threatened her with a knife to her throat and nostrils, and kept her there for hours until their 13-year-old son, known as Ralphy, returned. Defendant threatened Ralphy that he would shoot his mother if he did not cooperate or if he "tried anything." Cooperation included driving his mother's car on a public highway, even though he was only 13.

Ralphy later escaped. Defendant transported Yolanda through three states to the home of Mary Gillespie, who managed to contact the police.

Psychiatric diagnoses are conflicting as to whether defendant has schizophrenia. The evaluation which the trial court found to be the most thorough, and apparently credited, found that he has personality disorders.

The trial court made several conclusions. J. A. 49. Defendant's personality disorders did not significantly impair his capacity to appreciate the wrongfulness of his conduct or conform to the requirements of the law. The present offense involved deliberate cruelty and domestic violence within the sight of a minor child. The facts constitute substantial and compelling reasons to depart from the standard range sentence (49 to 53 months, with a firearm enhancement) and impose an exceptional, aggravated sentence. "A sentence of 90 months incarceration is a just and deserved punishment for defendant's conduct." *Ibid.*

The Washington Court of Appeals affirmed. Among other issues, it rejected Blakely's *Apprendi* claim, *i.e.*, that upward departure facts must be submitted to a jury and proved beyond a reasonable doubt. *State* v. *Blakely*, 111 Wash. App. 851, 870-871, 47 P. 3d 149, 159 (2002); J. A. 19. The Washington Supreme Court's decision in *State* v. *Gore*, 143 Wash. 2d 288, 314, 21 P. 3d 262, 276-277 (2001) was binding precedent to the contrary.

The Washington Supreme Court denied discretionary review. J. A. 60. This Court granted certiorari on October 20, 2003.

SUMMARY OF ARGUMENT

Guided discretion in sentencing is an important advance in the quest for fair, proportionate, and evenhanded sentencing. It avoids the opposite and equally noxious extremes of the rigid

common law mandatory system and the arbitrary system of unfettered discretion. Imposing *Apprendi* requirements would skew this system, distorting it from the balance struck when it was adopted. Making aggravating facts substantially more difficult to prove than mitigating facts would skew sentences downward on a wholesale basis. Legislative reaction to such a judicial distortion could ultimately hurt defendants on the low end of the culpability scale.

The fact that the Washington sentencing grid was enacted directly by the legislature, rather than indirectly through a sentencing commission, is not a valid basis for distinguishing the system from the federal system. *Apprendi* is based on the functional equivalence of a fact to an element of an offense, not on the source of the requirement. The entire guidelines approach to sentencing stands or falls in this case.

The open-ended factors that may be used for departure do not resemble elements within the meaning of *Apprendi*. The broad discretion and the myriad facts that may be considered make this, in terms borrowed from the capital cases, a selection decision and not an eligibility decision. *Apprendi* does not apply.

ARGUMENT

I. Sentencing reform through structured discretion should not be penalized with additional constitutional restrictions.

"Let no good deed go unpunished," would be an apt subtitle for the defendant's brief in this case. The State of Washington, like the Congress and many of its sister States, has turned to a structured-discretion approach to sentencing through sentencing guidelines.[2] Defendant's contention, in essence, is that the

2. We understand that the Washington system will be explained in detail in the State's brief and therefore will not repeat that discussion here.

system of structured discretion brings down upon the state Fifth and Sixth Amendment requirements that unquestionably did not apply to the system of unfettered discretion it replaced. See *Koon* v. *United States*, 518 U. S. 81, 92 (1996) (describing change made by federal Sentencing Reform Act of 1984). Such a holding would be a substantial setback for the quest for fair and effective sentencing policy.

Sentencing policy in America has gone through three phases. At the time of the founding, the trial judge in a felony case had little discretion. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 478-479 (2000). The sentence followed from the crime as determined by the jury's verdict and the peculiar issue of benefit of clergy. See *ibid.* *Apprendi* asserts an "invariable linkage of punishment with crime" at this time, mentioning benefit of clergy only in a parenthetical. *Ibid.* By failing to recognize the central role of benefit of clergy in common-law sentencing practice, *Apprendi* seriously overstated the linkage between offense and punishment at the time of the founding. Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Ring* v. *Arizona*, No. 01-488, pp. 3-5. Even so, for present purposes it is sufficient to note that punishment of felons was determined by a discrete number of facts and was not discretionary with the judge. See *id.*, at 5-6.

The shortcomings of the common law system are obvious. No criminal code, no matter how detailed, can hope to measure the culpability of individual defendants in real cases merely by the specification of predetermined elements of offenses. Such a system imposes equal sentences on defendants of widely differing culpability. "It is a wise man who said there is no greater inequality than the equal treatment of unequals." *Dennis* v. *United States*, 339 U. S. 162, 184 (1950) (Frankfurter, J., dissenting).

The next phase in sentencing policy was a lurch to the opposite extreme. Under this system, the judge had discretion to choose the sentence within a broad range. See *Mistretta* v. *United States*, 488 U. S. 361, 363 (1989). Not only was the

discretion broad, but it was essentially unreviewable. The trial "court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal." *Id.*, at 364; see also *Koon*, 518 U. S., at 96.

For a decision as controversial and value-laden as the punishment of crime, such unfettered discretion inevitably produced widely disparate sentences for similarly situated defendants. For capital cases, both unfettered discretion and fixed sentences have been declared unconstitutional. See *Furman* v. *Georgia*, 408 U. S. 238, 239-240 (1972) (*per curiam*); *Woodson* v. *North Carolina*, 428 U. S. 280, 301 (1976) (lead opinion). Guided discretion is now the only constitutional option. See *Sawyer* v. *Whitley*, 505 U. S. 333, 369 (1992) (Stevens, J., concurring in the judgment).

For noncapital sentencing, the Congress came to the same conclusion for much the same reason. So did many of the States.[3] Under the broad, unreviewable discretion existing before 1984, Congress found "'federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.'" *Koon*, 518 U. S., at 92 (quoting S. Rep. No. 98-225, p. 38 (1983)). Prior to the Sentencing Guidelines, the change from the rigid approach of the common law to the system of standardless discretion had only replaced the equal treatment of unequals with the unequal treatment of equals. That was little or no improvement.

The precedents are clear beyond question that under the standardless discretion system, the findings of facts that went into the judge's decision were not subject to the same constitutional restrictions as the elements of the offense. See, *e.g.*, *Williams* v. *New York*, 337 U. S. 241, 252 (1949).

---

3. "By 1996, more than twenty U. S. jurisdictions . . . had chartered" sentencing commissions. Reitz, Sentencing, in The Handbook of Crime and Punishment 547 (M. Tonry ed. 1998).

> "Our case law has long recognized a natural dichotomy between the guilt and penalty phases. The jury trial right contained in the Sixth Amendment . . . does not apply at sentencing . . . . Likewise inapplicable at sentencing is the requirement of the Due Process Clause that the prosecution prove the essential facts beyond a reasonable doubt." *Mitchell* v. *United States*, 526 U. S. 314, 337 (1999) (Scalia, J., dissenting).

"The Guidelines did not alter this aspect of the sentencing court's discretion." *United States* v. *Watts*, 519 U. S. 148, 152 (1997) (*per curiam*). In *Watts*, this Court upheld the use of a firearm offense in calculating the sentence for a drug offense, despite Watts' acquittal of the firearm offense. *Id.*, at 149-150. The basis of the holding was that acquittal only established reasonable doubt, while use of the offense for setting the sentence required only preponderance of the evidence. See *id.*, at 156-157. Acceptance of defendant's argument in the present case would require overruling *Watts*. If a fact authorizing departure from the presumptive sentence is subject to the jury trial and burden of proof requirements for elements of an offense, facts which go into the calculation of that sentence must be also.

The defendant's proposed restriction of sentencing information would be a step backward for sentencing reform. The essence of a guided discretion system is to establish a "heartland" range of sentences, considering the factors involved in typical cases, but allow discretion to "depart" when the case is unusual in a way not accounted for by those factors. See *Koon*, 518 U. S., at 93-94. These departures are intended to be symmetrical, upward based on aggravating facts and downward based on mitigating facts. See *id.*, at 94.

Defendant's proposed limitation would fundamentally alter the bargain struck by the legislature in enacting a guided discretion system, skewing the distribution of sentences downward. Under this limitation, facts justifying a downward departure need only be established by a preponderance of

evidence, while those for upward departure must be established beyond a reasonable doubt. Crimes committed by the defendant which can be proven by a preponderance of the evidence but not beyond a reasonable doubt have long been established as a legitimate factor in determining the sentence. See *Watts*, 519 U. S., at 152-153. Similarly, if a drug dealer succeeds in flushing away most of the cocaine between the police officers' knock-and-announce and their entry, see *United States* v. *Banks*, 540 U. S. __ (No. 02-473, Dec. 2, 2003) (slip op., at 9), the quantity should still be considered, if established by preponderance, for the purpose of setting the sentence within the statutory range, even though the range is determined by the amount that can be proven beyond a reasonable doubt. Cf. *Edwards* v. *United States*, 523 U. S. 511, 515 (1998) (unanimous).

The perception that sentencing under the Guidelines is being skewed downward can have regrettable legislative consequences. "Congress has recently indicated rather strongly, by the Feeney Amendment, that it believes there have been too many downward departures from the Sentencing Guidelines." W. Rehnquist, Remarks to the Federal Judges Assn. Bd. of Directors (May 5, 2003) (http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html). The resulting legislation "could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties." *Ibid.*; see Pub. L. 108-21, § 401, 117 Stat. 650, 667-676.

Amicus Kansas Public Defender says there is no need to worry, because the Kansas Legislature meekly acceded to the judicial skewing of its system. Brief for Kansas Public Defender as *Amicus Curiae* 6-7. This single example provides little, if any, basis for believing that other legislatures will react the same way.

Sentencing under skewed information is fundamentally unfair to the people, as this Court recognized in *Payne* v. *Tennessee*, 501 U. S. 808, 825 (1991). Legislative reaction to

correct the balance is likely, and it may take the form of further restrictions on downward departures or more mandatory minimums. Given what we have already seen with the Feeney Amendment, these possibilities are quite real.

Once before, this Court has penalized states for structuring discretion, placing on them a greater burden in litigation than was placed on States that left officials' discretion unfettered and therefore subject to greater abuse. That was a mistake that has been corrected, and it should not be repeated.

In *Hewitt* v. *Helms*, 459 U. S. 460 (1983) and subsequent cases, the entitlement of a prisoner to due process protection in prison disciplinary proceedings depended on the presence of a state-created "liberty interest," which in turn depended on the presence of "mandatory language in the [prison] regulations." See *Sandin* v. *Conner*, 515 U. S. 472, 482-483 (1995). In *Sandin*, the Court abandoned this approach, noting the "undesirable effect[]" that the approach "creates disincentives for States to codify prior management procedures in the interest of uniform treatment." *Id.*, at 482.

Acceptance of defendant's thesis would create a similar disincentive for the structuring of sentencing discretion. Given that unfettered discretion can be based on factfinding by the judge with no greater burden of proof for aggravating facts than for mitigating facts, converting those aggravating facts into elements merely because the state structures the discretion creates a disincentive for seeking uniformity. Conversely, it creates an incentive to take one step backward to the arbitrariness of unfettered discretion or two steps backward to the rigidity of no discretion.

No system of discretion is perfect, and the Sentencing Guidelines have their critics. But criticism of the guided discretion approach (as distinguished from a criticism of particular guidelines) calls to mind Winston Churchill's famous quip about democracy—the worst form of government except for all the others that have been tried. See K. Halle, The

Irrepressible Churchill 236 (1985). Guided discretion produces results that apportion punishment to culpability more evenhandedly than any of the alternatives. This approach to sentencing should not be penalized without compelling reason, and there is no compelling reason.

II. There is no basis for distinguishing the Washington system from the federal system for Sixth Amendment purposes.

Defendant seeks to distinguish the Washington system from the federal on two grounds: that the system was enacted by the Washington Legislature rather than a commission, Brief for Petitioner 2, and that the grounds for upward departure are slightly more restricted. *Id.*, at 3, n. 2.

Amici NACDL and FAMA offer ominously that the skewing of the federal Sentencing Guidelines may properly be left for "a later day." Brief for National Assn. of Criminal Defense Lawyers and Families Against Mandatory Minimums as *Amici Curiae* in Support of the Petition for Certiorari 14. We have seen this divide-and-conquer gambit before. Compare *Apprendi* v. *New Jersey*, 530 U. S. 466, 496-497 (2000) (capital cases distinguishable, not controlling precedent), with *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002) (capital cases not distinguishable, *Apprendi* requires overruling).

Before *Apprendi* metastasizes any further, the implications for overturning well-settled practices should be thoroughly understood. If a decision for the defendant in the present case is going to alter the balance struck by legislative compromise not only in the State of Washington but also in the Congress and in numerous states, see *supra*, at 6, that consequence should be known now and considered carefully before deciding to take such a step.

Apprendi does, of course, refer to the sentence ranges and limits as "statutory" or "prescribed by the legislature" numerous

times. See, *e.g.*, 530 U. S., at 481. That does not mean, though, that a presumptive sentence established directly by statute is distinguishable for this purpose from one established indirectly through a legislatively created commission. The dispositive question is when a purported sentencing factor has crossed the line so that it *functions* as an element of an offense and must be treated as an element for jury trial and burden-of-proof purposes. See *id.*, at 494-495. That function does not depend on the source of the factor.

The legislative branch has the authority to define elements of crimes when it chooses to exercise it, but the authority is not necessarily exclusive. The original English common law crimes were defined in case law, not statutes, see 1 W. LaFave, Substantive Criminal Law § 2.1(b), pp. 104-105 (2d ed. 2003), and "most of the states in the beginning had common law crimes." *Id.*, § 2.1(c), at 106. Some states still have common law crimes, despite the adoption of comprehensive criminal codes. See *id.*, § 2.1(c), at 107, and n. 20. Although there are generally no federal common law crimes, Congress can and has "provided for common law crimes in the District of Columbia" and federal enclaves. *Id.*, § 2.1(c), at 107-108. In military justice, Congress can delegate the designation of death penalty - eligibility circumstances to the President. *Loving* v. *United States*, 517 U. S. 748, 769 (1996). These circumstances are elements for the purpose of *Apprendi*. See *Ring*, 536 U. S., at 609.

An "offense" is not necessarily defined directly by a statute, and in the States may not even be indirectly defined by statute. The central question of whether a fact is an element of an offense for jury trial and burden-of-proof purposes therefore cannot depend on whether the legislature defined the offense directly, indirectly, or not at all.

Defendant's argument, in essence, is that the facts defining a presumptive sentence as established in the Washington Legislature's sentencing grid amount to an "offense" for *Apprendi* purposes and that any fact needed to depart upward

effectively amounts to an element of a greater offense. If that were true for a grid enacted directly by the legislature, it would be equally true for the grid established indirectly by Congress through the Sentencing Commission. It would be nonsensical to hold that the sentencing grid defines offenses if the State adheres to the stricter separation-of-powers view of the *Mistretta* dissent, but an identical grid placing an identical restraint on the sentencing judge does not define offenses if the legislature delegates its creation to a commission. See *Apprendi*, 530 U. S., at 523, n. 11 (Thomas, J., concurring).

The second claimed ground of distinction is that *some* duplication of elements with sentencing factors is allowed in the federal system but not the Washington system. Brief for Petitioner 3, n. 2. This is a perverse rationale. See *supra*, at 4. If this Court should declare present Washington practice unconstitutional on this basis, the Washington Legislature could reinstate it by *removing* a protection presently extended to defendants in that State. Constitutional principles ought not depend on such quirks.

III. The relevant "range," for purposes of *Apprendi*, is the range set by statute for Class B felonies.

The rule of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) applies to a factual finding, however designated, that is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.*, at 494, n. 19. It does not apply to "a circumstance . . . that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Ibid.* (emphasis in original). The present case turns on the question of what is the "range" and what is "authorized" in a guidelines system.

The essence of a factor subject to *Apprendi* is that "it increase[s] . . . the maximum range within which the judge could exercise his discretion . . . ." *Id.*, at 474. Defendant maintains that the standard range sentence in the sentencing

grid is the relevant range, because the sentencing judge must find aggravating circumstances in order to depart. Brief for Petitioner 13-14. This argument distorts *Apprendi* beyond recognition.

In a system of unfettered, unreviewable discretion, a sentencing judge *could* impose a maximum sentence in the absence of any aggravating facts whatever. Such a sentence, although legal, would be arbitrary and unjust. That is why Congress and numerous States have abandoned such systems and replaced them with guided, reviewable discretion. An open-ended requirement that the judge find some aggravating facts before imposing a sentence at the high end of a range is a far cry from the sentence enhancement in *Apprendi* that required a finding of one particular fact in order to raise the ceiling.

The capital cases are instructive here, because this is the area where guided discretion has received the greatest scrutiny. The cases clearly separate the eligibility decision from the selection decision. See *Tuilaepa* v. *California*, 512 U. S. 967, 971 (1994); *Shafer* v. *South Carolina*, 532 U. S. 36, 50 (2001) ("discrete and sequential functions"). To raise the ceiling of punishment which may be considered from life in prison to death, the jury must find an aggravating circumstance off a prescribed, statutory list defined in advance and subject to review for vagueness. See *Tuilaepa*, *supra*, at 972. In the selection decision, on the other hand, open-ended consideration of a myriad of factors is allowed. *Id.*, at 979-980. The eligibility factors are subject to *Apprendi*. *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002). The facts considered in the selection decision are not. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Schriro* v. *Summerlin*, No. 03-526, pp. 20-21. The open-ended nature of the departure decision in Washington noncapital sentencing makes it a selection decision, not an eligibility decision. Former Wash. Rev. Code § 9.94A.120(2), App. to Pet. for Cert. 52a, merely required "substantial and compelling reasons" to depart, and former § 9.94A.390 pro-

vided a list of factors that were expressly illustrative and not exclusive. See App. to Pet. for Cert. 60a; see also Wash. Rev. Code § 9.94A.535 (same language in present statute). By requiring that the sentencing judge find aggravating circumstances to depart from the standard range, Washington has simply added structure, guidance, and reviewability to the discretionary sentencing choice that *Apprendi* unmistakably held was not subject to its restrictions. See 530 U. S., at 494, n. 19.

In footnote 16, the *Apprendi* Court acknowledged, in response to the dissent, that a State could achieve the same result as the New Jersey statute by extending statutory maximums and then "giving judges guided discretion as to a few specially selected factors within that range . . . ." *Id.*, at 490, n. 16. The Court counted on "structural democratic constraints" and other precedents, not the *Apprendi* rule, to prevent that from actually happening. *Id.*, at 490-491, n. 16. If a guided discretion system enacted as a subterfuge to evade *Apprendi* would not be subject to its rule, then a guided discretion system enacted for the entirely proper purpose of dispensing evenhanded justice surely is not.

The sentencing range, for the purpose of *Apprendi*, is the range for Class B felonies set forth in Wash. Rev. Code § 9A.20.021. The facts supporting departures in this system are true sentencing circumstances, not elements in disguise, and may be found by the judge by the preponderance of the evidence.

CONCLUSION

The decision of the Washington Court of Appeals should be affirmed.

January, 2004

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation